87-1416

No.

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

vs.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LISA S. VAN AMBURG
SCHUCHAT, COOK & WERNER
1221 Locust, Suite 250
St. Louis, Missouri 63103
(314) 621-2626
Attorney for Petitioners

February 22, 1988

St. Louis Law Printing Co., Inc., 13305 Manchester Rd. 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether a showing of civil contempt is necessary before the District Court is empowered, under the remedial provisions of Title VII, to maintain continuing jurisdiction and to monitor the Defendants' recruitment and hiring practices which have been found to violate Title VII.

2. Whether a showing of civil contempt is necessary before the District Court is empowered, under the remedial provisions of Title VII, to order injunctive relief which includes goals for hiring and increasing the applicant pool of women upon a finding of intentional pattern and practice sex discrimination.

3. Whether the trial court is precluded from finding non-intentional discrimination against the individually named plaintiffs when the jury has found no intentional discrimination under 42 U.S.C. 1983.

4. Whether the class certified should have included all women in the State of Missouri rather than one geographic district of the Defendant Missouri Highway and Transportation Commission.

LIST OF ALL PARTIES TO THE PROCEEDING

Jane Catlett
Patricia Leembruggen
Grace Tuter Shelley
Adeline Kallemyn
Aughty L. Bailey
Stari Buehler
Debre Farris
Debbie J. Fowler
Jayne L. Garrett
Debbie J. Lyons
Martha Patton
Evelyn Young
Glenda Bond
Rosalee Habermehl
Rebecca McCrown
Theresa Marshall
Patricia Martone
Lucy Anderson
Joyce Bass
Cynthia Benner
Rebecca Cook
Georgia Eddington
Lori Etherton
Diane Gaehle
Melinda Gottas
Ethel Hirsch
Gerry Johnson
Margaret Johnson-Wood
Sonna Jones
Edith Kelly
Virginia Means
Sheree Moran
Jackie Nelson
Shirley Nelson Butts
Goldie Potter

Delores Powers
Brenda Smith
Betty Spitler
Brenda Storie
Audrey Sturdefant
Rebecca Swindall
Vickie Wand
Cheryl Young
Andrea Anderson
Beatrice Ash-Thomas
Norma Auslam
Nancy Baker
Connie Baldwin
Sally Lou Bates
Sarah Baumgartner
Sherry Biggs
Betty Jo Booher
Jean Bray
Nancy Cameron
Sandra Churchill
Sharon Claspill
Louise Cromwell
Marla Cypret
Janet Daniels
Verla Daugherty
Lucinda Dennis
Katherine Duncan
Karen Faulkner
Sharon Grant
Sally Graves
Karen Hall
Cheri Haney
Leona Hankins
Cleta Harris
Judy Hayes
Veta Hood

Shirley Hosier
Darra Justice
Myrna Kimberling
Lois Ludwig
Jean McClellan
Jane Mast
Delores Merrill
Rose Middaugh
Sandy Miller
Nancy Murray
Jo Myers
Loretta Nelson
Joetta Newman
Shirley Jones
Janice Perry
Sharon Pierson
Patricia Pigorsch
Janet Plemmons
Linda Radford
Lynn Roth
Janet Rowden
Vicki Rufer
Phyllis Scholfield
Michelle Sheldon
Delilah Shobe
Marideth Sisco
Mary Ellen Smith
Sandra Startzman
Frances Stiebel
Anna Stokes
Sherry Stone
Connie Stroud
Linda Van Stavern
Bonnie Warner
Beverly Welch
Linda Jo Willis

Debbie Wolfe
Jo-Ann Bartley
Cindy Bass
Henrietta Bellamy
Jan Lynn Berg
Elizabeth Doehm
Terry Bonds
Christi Carney
Karen Cordova
Deborah Cox
Tammy Cross
Janice Crumpley
Betty Davison
Sharon Doran
Judy Dumback
Joyce Earls
Mary Eldringhoff
Cindy Emery
Candance Gentry
Becky Jo Goad
Billie Guerra
Jerri Hill
Clara January
Pamela Joliff
Karen McKenzie
Virginia McMillin
Cheryl Main
Ricki Martinetti
Gala Minor-Carrier
Donna Muffitt
Sheila Potter
Pixie Rippy
Roxie Rosenbaum
Tamra Russell
Sharon Stafford
Cynthia Taylor

Carla Trowbridge
Connie Tyler
Kathy Van Zandt
Janet Whitlock
Lynn Bennett
Sharon L. Clark
Dee Davis
Brenda Smith-Dixon
Debra Everitt
Kimberly Meier
Lauren Minkler
Kelly Ormsby
Glenda Peak
Deborah Pippin
Janet Tower
Jody Williams
Susan Yowell
Missouri Highway and Transportation Commission
Robert N. Hunter
U. B. Unsell

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	vi
Table of Authorities	viii
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	8
I. The United States Court Of Appeals For The Eighth Circuit's Decision Addresses An Important Federal Question Regarding Affirmative Relief In A Title VII Sex Discrimination Case Which Has Not Been, But Should Be Settled By This Court And Which Is In Conflict With Applicable Decisions Of This Court	8
A. Monitoring And Reporting	11
B. Recruitment Goals	11
C. Hiring Goals	13
II. The Decision Below Regarding The Issue Of Relief For The Four Named Plaintiffs Raises Significant And Recurring Questions Of Whether Elements Of An Unregulated, Subjective Hiring Process May Be Evaluated Under The Adverse Impact Model Of Proof Under Title VII	14

III. The Issue Of The Scope Of The Class Is An Important Federal Question Which Has Not Been, But Should Be Settled By This Court 17

Conclusion 19

Appendix:

Opinion And Order Of The United States Court of Appeals (Sept. 9, 1987) A-1

Order And Memorandum Of The United States District Court (Dec. 5, 1983) A-25

Order Of The United States District Court (Dec. 18, 1985) A-63

Order And Memorandum Of The United States District Court (Aug. 9, 1982) A-79

TABLE OF AUTHORITIES

Page

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) 8,11

Atonio v. Wards Co. Packing Co., 810 F.2d 1477 (9th Cir. 1987) 17

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 8,11

General Building Contractors Assoc. v. Pennsylvania, 458 U.S. 375 (1982) 11

Gilbert v. Little Rock, 722 F 2d 1390 (8th Cir. 1983) *cert. denied,* 104 S.Ct. 2347 (1984) 17

Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) 17

Herbst v. International Telephone and Telegraph Co., 65 F.R.D. 13 (D. Conn. 1973), *affirmed,* 495 F.2d 1308 (2nd Cir. 1974) 19

Karan v. Nabisco, 78 F.R.D. 388 (W.D. Penn. 1978) 18

Local 28, Sheet Metal Workers International Association v. EEOC, 106 S.Ct. 3019 (1986) 8,9,11,12

Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) 18

Soffard v. Safeway Stores, Inc., 78 F.R.D. 460 (N.D. Cal. 1978) 18

Stastny v. Southern Bell, 628 F.2d 267 (4th Cir. 1980) 18

Tally v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983) *cert. denied,* 466 U.S. 952 (1984) 17

Teamsters v. United States, 431 U.S. 324, 364 (1977) 8

United States v. Paradise, 107 S.Ct. 1053 (1987) 9

Watson v. Fort Worth Bank & Trust, No. 86-6139 17

Statutes:

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 2101(c) 2

42 U.S.C. Section 1983 3,14

42 U.S.C. 2000e-5(g) 2

Rule 23 of the Federal Rules of Civil Procedure 18,19

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

vs.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Jane Catlett, Patricia Leembruggen, Grace Tuter, and Adeline Kallemyn, individually and on behalf of all others similarly situated, respectively pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned proceeding on September 9, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 828 F.2d 1260 (8th Cir. 1980) and is reprinted in the Appendix hereto at page A-1.

The opinion of the United States District Court for the Western District of Missouri on the issue of liability is reported at 589 F.Supp. 929 (W.D.Mo. 1983) and is reprinted in the Appendix hereto at page A-25.

The opinion of the United States District Court for the Western District of Missouri regarding the remedy phase of the trial is reported at 627 F.Supp. 1015 (W.D.Mo. 1985) and is reprinted in the Appendix hereto at page A-63.

The opinion of the United States District Court for the Western District of Missouri regarding the certification of the class is not reported and is reprinted in the Appendix hereto at page A-79.

JURISDICTION

On September 9, 1987, the United States Court of Appeals for the Eighth Circuit issued its Order partially affirming, partially reversing and partially remanding the district court's judgment on liability and relief. On October 23, 1987, the United States Court of Appeals denied all petitions for rehearing.

On January 7, 1988, Justice Blackman signed an Order extending Petitioners' time to and including February 22, 1988 for filing Petition for Writ of Certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 2101(c).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides in relevant part, as follows at 42 U.S.C. 2000e-5(g):

> (g) If the court finds that the Respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the Respondent from

> engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.

STATEMENT OF THE CASE

In June of 1975, Jane Catlett filed an EEOC charge of sex discrimination against the Missouri Highway Department which rejected her application for entry level "maintenance man" position. In March, 1978, Catlett filed a class action in the district court alleging a violation of Title VII of the 1964 Civil Rights Act and 42 U.S.C. Section 1983. Patricia Leembruggen, Grace Tuter and Adeline Kallemyn later intervened as named plaintiffs. The Plaintiffs alleged that the Missouri Highway and Transportation Commission intentionally discriminated against women in recruitment and hiring practices for an entry level position which required an eighth-grade education and an ability to operate light-weight motor equipment. Plaintiffs sought damages for back wages and lost benefits of employment, as well as declaratory and injunctive relief.

By order dated August 9, 1982, the court certified the class to include all women who applied or who might have applied for a "maintenance man" position in District Eight of the Highway Commission between January 1, 1975 and the last day of May, 1980. Plaintiffs had sought certification for a class of *all* women (all ten districts of the Missouri Highway Department) in the State of Missouri.

The trial of this case commenced on September 15, 1983 and concluded on September 23, 1983. On the Section 1983 claims, the jury returned verdicts in favor of the class and against the Commission, Hunter and Unsell and returned verdicts for the Defendants on the individual claims of the four named Plaintiffs.

On the Title VII claim, the court concluded that the Highway Commission, through its recruitment and hiring policies, engaged in a pattern and practice of sex-based discrimination against the class. The court also found that the four individual plaintiffs were victims of nonintentional sex discrimination under Title VII. The trial court found pervasive and purposeful sex discrimination by the Highway Commission in numerous phases of recruitment, selection and hiring for the maintenance position.

Among the findings made by the trial court were the following:

1. The job at issue, "maintenance man," was an entry-level position considered to be unskilled or semi-skilled, requiring a minimum of eighth grade education and an ability to operate light-weight motor equipment;

2. The Highway Department in District Eight relied primarily on word-of-mouth recruitment for filling new maintenance vacancies from January 1, 1975 through May 31, 1980;

3. The maintenance work force in District Eight was all male until December of 1976 when the first female was hired after Jane Catlett filed an EEOC charge;

4. Most applicants applied directly to the Highway Commission by walk-in application;

5. In December of 1976, the Chief Executive Officer of the Highway Department issued a directive to all District Engineers to the effect that the Commission's traditional methods of recruitment must no longer be relied upon to recruit female and minority applicants, and that advertising should be undertaken to increase the number of female and minority applicants. The memo directed that local population statistics should be used as the guide in recruitment efforts. Despite this knowledge, however, neither Chief Engineer Hunter nor the hiring officials in District Eight took any meaningful steps to implement the directive;

6. The percentages of women in the relevant labor pool ranged from forty-two percent (42%) in 1970 to forty-eight percent (48%) in 1980;

7. There was a statistically significant underrepresentation of women in the applicant pool for the maintenance position, as well as a statistically significant disparity in the number of women hires;

8. Women were discouraged from applying and then pursuing their applications for the maintenance position by the Highway Department's reputation for discrimination against women and by its practices of treating women disparately in the interview and selection process.

At the remedial stage of the litigation, Plaintiffs submitted as additional evidence a copy of a public record, the Report of the Federal Highway Administration, dated November 21, 1984 (over a year after the liability finding), which found "extensive deficiencies" in the Missouri Highway Department's EEO program, including its failure to have an approved affirmative action program and its failure to provide "minority female goals in annual increments over a five year period." In addition, with respect to the maintenance job, the report stated that women were underrepresented and further that "[t]he persistence of patterns of underrepresentation in the employment of minorities and women in the face of opportunities made available by attrition and coupled with the extraordinary minority termination rates indicate the existence of discriminatory hiring and other discriminatory practices."

In response to Plaintiff's evidence, the Highway Department claimed recent efforts to hire women for the maintenance job and recent efforts to train supervisors regarding EEO principles. At the remedial stage, the Highway Department offered evidence that in 1983 it employed in District Eight sixteen men and two women in the maintenance position; in 1984 twenty men and three women in the maintenance position. The

Highway Department also submitted a revised interview and application form, a revision of the job title of "maintenance man" to "maintenance crew member" and an affidavit stating that a four hour training program had been given to its supervisors.

On December 13, 1985, the district court granted summary judgment for the plaintiffs with respect to backpay and injunctive relief. The court did not feel bound by the jury verdict against the individually named plaintiffs because the jury passed only on the issue of intentional discrimination whereas the district court held that the named plaintiffs were victims of nonintentional discrimination. The court awarded the four named plaintiffs make-whole backpay relief.

The court awarded backpay to the members of the class as well, finding that but for the discrimination, thirty-eight vacancies for the maintenance position in District Eight would have gone to women. The court limited the total backpay liability to the class at thirty-eight (38) jobs and ordered that the one-hundred-fifty (150) class members should share the backpay according to a formula.

In addition to monetary relief, the court ordered certain injunctive relief. The court stated:

> While defendants argue that their voluntary efforts in changing their hiring practices are enough to preclude additional affirmative relief, the court finds the long history of discrimination and the comparatively short history of attempts to end such discrimination warrant further measures. . . . (A-69).

The court retained jurisdiction for four years "to monitor the implementation of this order and to require additional specific action, if necessary, to eradicate any remaining discrimination." In furtherance of its monitoring role, the court ordered the Highway Department to file a report on January 1 of each of four years showing a breakdown by sex of applicants and hires for the job in question.

The court also ordered the Highway Department to generate an actual pool of applicants for the maintenance job in District Eight consisting of thirty-seven to forty-eight percent women. Additionally, the court ordered that between thirty-seven to forty-eight percent of new vacancies for maintenance crew jobs in District Eight be filled with women, which percentage may include the eligible class claimants.

The United States Court of Appeals, in its opinion of September 9, 1987, reversed the district court on several issues pertinent to this Petition. First, the Court of Appeals removed the district court's maintenance of jurisdiction for four years and removed the reporting requirements which would enable the plaintiffs and the district court to monitor the Highway Department's compliance with the decree. Second, the Court of Appeals removed the hiring and recruitment goals and replaced them with a generalized injunction prohibiting further discrimination by Missouri. The Court held that affirmative relief was not appropriate absent a showing by plaintiffs that the Highway Department has engaged in contempt of court.

The Court of Appeals also found that the district court was estopped from finding nonintentional discrimination against the named plaintiffs by the jury verdict against the named plaintiffs on the issue of intentional discrimination.

Finally, the Court of Appeals found that the district court did not abuse its discretion in failing to certify a statewide class. Petitioners therefore seek review of the following actions of the Court of Appeals:

1. Removal of injunctive relief requiring reporting and monitoring; goals for recruitment of women; goals for hiring of women for four years;

2. Reversal of the make-whole backpay relief for the individually named plaintiffs;

3. Affirmance of the district court's limitation of the class to District Eight of the Missouri Highway and Transportation Commission.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The United States Court Of Appeals For The Eighth Circuit's Decision Addresses An Important Federal Question Regarding Affirmative Relief In A Title VII Sex Discrimination Case Which Has Not Been, But Should Be, Settled By This Court And Which Is In Conflict With Applicable Decisions Of This Court.

In *Sheet Metal Workers v. EEOC,* 106 S.Ct. 3019, 3045 (1986), Justice Brennan stated that:

> [t]he language of Section 706(g) plainly expresses Congress' intent to vest district courts with broad discretion to award appropriate equitable relief to remedy unlawful discrimination. *Teamsters v. United States,* 431 U.S. 324, 364 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975).

Six justices agreed that a district court may "in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII." 106 S.Ct. at 3054. There were four factors in the *Sheet Metal Workers* case which supported the district court's imposition of goals:

1. The Defendant union had a long and egregious history of racial discrimination;

2. The flexible application of the membership goal indicated it was being used as a benchmark and not simply to achieve or maintain racial balance;

3. The membership goal was temporary; and

4. Neither measure unnecessarily trammelled upon the interests of white employees.

See id. at 3050-52.

The United States Court of Appeals in this case has added to this body of law a threshhold requirement before vesting the district court with discretion to enter even the most unobtrusive relief imaginable, monitoring and reporting. In effect, the court held that absent a showing of contempt, the district court is not empowered to award affirmative relief under Title VII with respect to recruitment and hiring practices and monitoring and reporting requirements if the relief in question might incidentally benefit persons who have not been identified as victims of discrimination.

Referring to *Local 28, Sheet Metal Workers International Association v. EEOC,* 106 S.Ct. 3019 (1986) and *United States v. Paradise,* 107 S.Ct. 1053 (1987), the Eighth Circuit explained its reasoning for removing the affirmative relief ordered by the district court:

> The Supreme Court in each instance emphasized that the lower court had mandated affirmative action only after the defendant had failed to live up to *court-ordered* commitments to eliminate discriminatory practices. *See Paradise,* 107 S.Ct. at 1066. Thus, race-conscious remedies benefiting nonvictims were supported not only by the societal interest in eradicating discrimination, but also by the societal interests in ensuring compliance with *court decrees* and eliminating the effects of delays in compliance. *Id.* at 1067; *see also Sheet Metal Workers,* 106 S.Ct. at 3055 (Powell, J., concurring).
>
> Applying these principles to the case before us, we cannot say Missouri has a "long history of 'foot-dragging' resistance to *court orders*" such that simply enjoining the state from further discriminatin would clearly be futile. See *Id.* at 3051. The Supreme Court has not yet approved a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a

> generalized injunction against further discrimination. We decline to take that step here. (Emphasis added)

(A-17).

There is no question that this case involves egregious, long-standing and persistent discrimination on the part of the Missouri State Highway Commission. As the district court noted:

> It is a serious matter when any employer engages in employment discrimination, but it seems particularly grave for the state to practice discrimination against its own citizens, as these are the people who pay the taxes that support and maintain the government, and whom the elected and appointed officials are to serve. It is distressing and demeaning that a branch of the Missouri state government should be guilty of unlawful discrimination against its own citizens.

(A, 61-62).

The district court had before it evidence that the Highway Department persisted in discriminating against women even after the finding of liability. The Federal Highway and Transportation Administration's Report, issued more than a year after trial on the liablity phase, stated that the Highway Department persisted in its failure to comply with the law. The district court had also found that as early as 1976, the Highway Department was aware of the urgent need to revise its recruitment practices and of the underrepresentation of women in the maintenance work force. Yet, the Highway Department took no steps to comply with the law and knowingly failed to remedy the situation.

In spite of this record of persistent, egregious and long-standing intentional discrimination against women, the Court of Appeals struck down all contested affirmative relief because there had been no violation of a court decree. The Court of Ap-

peals does not find that the goals imposed were unreasonable or that the monitoring and reporting requirements were burdensome. Yet, with one broad motion, the Court of Appeals discards even the least drastic affirmative relief imaginable, reporting and monitoring requirements.

By requiring a showing first of contempt of court, the Eighth Circuit has effectively destroyed the broad remedial powers of the trial court under Title VII which this Court had affirmed in *Sheet Metal Workers, Teamsters v. United States, Franks v. Bowman Transportation Co.*, and *Albemarle Paper Co. v. Moody.*

A. MONITORING AND REPORTING.

This kind of injunctive relief — imposing requirements for periodic reporting to the Court — is essential to monitor compliance with the nondiscrimination injunction when the employer has demonstrated a longstanding unwillingness to change its discriminatory practices. *See General Building Contractors Association v. Pennsylvania,* 458 U.S. 375, 404 (1982) (O'Connor, J., *concurring*). The appeals court has left plaintiffs in a "Catch 22" situation. Plaintiffs must show *contempt* before the district court may order the Highway Department to report its hiring policies and practices. Yet, without the data, plaintiffs have no way of knowing whether the Highway Department is complying with the decree! Thus, even the least drastic "affirmative relief" imaginable is thrown out because there is no history of contempt. Such wholesale rejection of affirmative relief of any kind whatsoever is a serious erosion of this Court's interpretation of Title VII's remedial provisions.

B. RECRUITMENT GOALS

The Court of Appeals has effectively held that absent a showing on contempt, the district court is not empowered to award affirmative relief with respect to recruitment and hiring practices, if that relief is not confined exclusively to identifiable victims.

It is virtually impossible to identify victims of recruitment discrimination. These are the very women who do not apply and who are discouraged from pursuing job opportunities. A goal of thirty-seven to forty-eight percent female for increasing the female applicant pool is certainly within the trial court's discretion under the facts of this case. There are no innocent victims of such affirmative relief, and it is not designed to achieve a gender-balanced work force. It is designed, however, to end the "lingering effects of pervasive discrimination" where the Highway Department has a longstanding reputation for discouraging women from applying. Despite knowledge of serious underrepresentation of women in the applicant pool as early as 1986, the Highway Department continued to actively discourage women from pursuing job opportunities. The trial court found that the female applicant pool was chilled by the Commission's discriminatory practices. The district court's remedial order with respect to the recruitment practices is designed to increase the applicant pool of females over a four year period of time. There is no way to identify any victims of discriminatory recruitment practices. They simply do not come forward as they are the "chilled" applicant pool. But the Eighth Circuit's holding is an apparent major condemnation of *any* affirmative relief which benefits nonvictims of discrimination, no matter what the context, absent a showing of contempt. This was not the intent of the Court in *Sheet Metal Workers.* In fact, the Eighth Circuit's holding conflicts with this Court's reasoning in *Sheet Metal Workers.*

Affirmative action in recruitment has been characterized by this Court in *Sheet Metal Workers* as a "less harsh" type of affirmative action. *See Sheet Metal Workers v. EEOC,* 106 S.Ct. 3019, 3050 n. 46 (1986). It is the kind of relief necessary when a general injunction would not have been sufficient to extend to women equal opportunities for employment. Applicant pool goals are widely used as a painless remedial device to reverse the effects of discrimination against women. This Court's review is necessary in order to preserve this kind of affirmative action in

cases where egregious and longstanding discrimination falls short of actual contempt of court.

C. HIRING GOALS.

As make-whole relief for the identified class members, the district court placed eligible class claimants who desire a maintenance job on a preferential hiring list (A-70). The Court of Appeals let stand the preferential hiring but limited it to thirty-eight (38) vacancies which is the number of jobs that would have gone to women absent discrimination (A-16).

The affirmative relief at issue is the district court's imposition of a hiring goal for new vacancies over the next four years. The district court required the Highway Department to fill between thirty-seven percent (37%) to forty-eight percent (48%) new vacancies for maintenance man over the next four years with women *which may include* the eligible class claimants (A-72). Since the average number of vacancies per year is twenty (20) (assuming no hiring freeze), the goal of hiring between thirty-seven percent (37%) to forty-eight percent (48%) women for new vacancies can be entirely met by filling vacancies with eligible class claimants. Consequently, the affirmative hiring goal imposed by the district court is merely a guidelne and only benefits "nonvictims" if the class members choose not to be hired first. The Court of Appeals' rejection of this innocuous guideline, absent a showing of contempt, demonstrates a knee-jerk response to any remedy labeled "affirmative action."

The hiring goal in this case amounts to nothing more than a mere guideline for the district court and for the Highway Department. It is not intended to balance the workforce; it does not injure innocent males; it is certainly flexible in that it benefits primarily victims of discrimination and it is ordered in the context of longstanding and egregious sex discrimination.

The Appeals Court has left the plaintiffs with an injunction which simply reiterates Title VII's prohibition against dis-

crimination. It is the kind of injunction which is useless in the face of recalcitrant employers such as the Missouri Highway Department.

The Appeals Court's requirement of a showing of contempt before allowing even the most innocuous form of affirmative relief following a finding of intentional pattern and practice of discrimination against women as a class is a decision upon an important question of federal employment law requiring this Court's review. If affirmative relief such as that awarded here is not allowable in a sex discrimination case where there is proof of egregious and longstanding intentional discrimination, then the remedial provisions of Title VII allowing injunctive relief will be seriously undermined. If left to stand, the decision will endanger well-established principles set by this Court to guide lower federal courts in exercising their discretion under the remedial provisions of Title VII.

II. The Decision Below Regarding The Issue Of Relief For The Four Named Plaintiffs Raises Significant And Recurring Questions Of Whether Elements Of An Unregulated, Subjective Hiring Process May Be Evaluated Under The Adverse Impact Model Of Proof Under Title VII.

The trial court found that the individually named plaintiffs were victims of the "biased interview process and the unregulated hiring procedure" and characterized this finding as one of disparate impact (A-64). Consequently, the court rejected the Highway Department's assertion that the jury finding against the individually named plaintiffs on intentional discrimination under the 42 U.S.C. 1983 precluded the court's independent finding of nonintentional discrimination against the individually named plaintiffs under Title VII. The Highway Department did not assert its "collateral estoppel" argument, however, until *after* the district court made its findings on the issue of liability in its initial Order of December 5, 1983 (A-64).

Consequently, the court below was deprived of the opportunity to discuss fully the specific ways in which the policies and practices fostered by the unregulated hiring process, although fair in form, adversely impacted on the class and individually named plaintiffs.

The Court of Appeals, addressing the plaintiffs' argument that estoppel does not apply because the district court's Title VII findings in favor of the plaintiffs went beyond those made by the jury, states:

> As we understand the district court's opinion, however, the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting, finding that the existing predominantly male work force communicated information on job openings primarily to other males. . . . Since the individual plaintiffs all applied for maintenance positions, they were not victims of this discriminatory practice, and they cannot benefit from the court's disparate impact analysis. (A-7)

Consequently, the Court of Appeals missed the court's finding regarding the "unregulated hiring process" as it impacted on the named plaintiffs and glosses over the issue of whether or not identifiable components of an unregulated process which adversely impact on women may support a finding of nonintentional discrimination. For example, in its initial judgment on liablity, the court found that the Highway Department's application form was inadequate because it did not request a listing of relevant and nonpaid experience operating lightweight motor equipment, one of the two qualifications for the job. The court found that:

> [N]umerous female applicants for the maintenance man position had experience with lightweight motor equipment through nonpaid or self-employed farm and trucking experience, but were not able to indicate this type of experience on the application form. Not all applicants for

the position of maintenance man were interviewed for this position, however, as some applicants were screened on the basis of information contained on the application form, or on the basis of the personal knowledge of the selecting official regarding a particular applicant. As a result of the failure of the application form to provide a space for the listing of unpaid experience or lightweight motor equipment experience, there was a reduced likelihood that these otherwise qualified female applicants would be selected for an interview. (A-37)

This finding is one of adverse impact with respect to a practice fair in form (failure to ask nonpaid or even paid lightweight motor equipment experience). Yet, in the face of this finding, the appeals court notes that with respect to Patricia Leembruggen, a "nondiscriminatory" reason for not hiring her was her failure to list on the application her lightweight equipment skills (A-8). The trial court, however, has found this practice to be discriminatory and further found that the named plaintiffs were victims of adverse impact discrimination under Title VII because they too suffered the effects of the unregulated hiring process. The "nondiscriminatory reasons" articulated by the Highway Department for not hiring the individually named plaintiffs were all challenged by plaintiffs as neutral policies without business justification which adversely impact on women (i.e., Highway Department's preference for applicants with previous maintenance experience favoring males - articulated as a defense to failure to hire Kallemyn and Leembruggen; Highway Department's failure to consider applicants for more than one vacancy - combined with few female applicants adversely affects women - affected all named plaintiffs, etc.). Plaintiffs' arguments were made but not specifically addressed by the trial court in its findings on liability because it wasn't necessary to do so at that time. The Highway Department had not yet offered its "collateral estoppel" argument against relief for the individual plaintiffs.

The issue of whether nonintentional impact analysis may be applied to evaluate the legality of an unregulated, subjective selection process is presently before the Court in *Watson v. Fort Worth Bank & Trust,* No. 86-6139. The various circuits have not demonstrated any consistency on this issue, including the Eighth Circuit. *See Tally v. United States Postal Service,* 720 F.2d 505 (8th Cir. 1983), *cert. denied,* 466 U.S. 952 (1984); *Harris v. Ford Motor Co.,* 651 F.2d 609 (8th Cir. 1981) (refusing to apply impact analysis); *contra Gilbert v. Little Rock,* 722 F.2d 1390 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 2347 (1984) (applying disparate impact analysis to subjective selection process). Recently, the Ninth Circuit Court of Appeals found that adverse impact analysis may be applied to a subjective selection process, joining a clear majority of circuits as well as the Equal Employment Opportunity Commission on this very important issue. *See Atonio v. Wards Cove Packing Co.,* 810 F.2d. 1477 (9th Cir. 1987). If this court finds in *Watson* that adverse impact analysis may be applied to evaluate the legality of an unregulated, subjective hiring process, then the named plaintiffs should prevail under Title VII. The trial court's finding in favor of the named plaintiffs should not then be collaterally estopped by the jury's finding on intentional discrimination.

III. The Issue Of The Scope Of The Class Is An Important Federal Question Which Has Not Been, But Should Be Settled By This Court.

The trial court refused to certify a statewide class based on commonality and manageability. In its Certification Order of August 9, 1982, the court found that "[e]ach district office implements its own employment policies with respect to recruitment and selection of employees." Therefore, the court decided that the questions of fact would not be common across the state because of the differences in the hiring process in the ten districts. In addition, the trial court found that a trial on the merits would be unmanageable if the class included all ten districts. The court gave no explanation as to why the action

would be unmanageable, however (A-86). Then, at the liability trial, the court found that personnel and employment policies are formulated and controlled by the Commission's headquarters (A 33-34).

Rule 23(a) requires a class to be sufficiently homogenous and definable so that those bound by the judgment are capable of determination. Rule 23(a)(2) provides that "one or more members of the class may sue or be sued as representative parties on behalf of all only if . . . there are questions of law or fact, common to the class." The Eighth Circuit has noted that "the rule does not require that every question of law or fact be common to every member of the class." *Paxton v. Union National Bank,* 688 F.2d. 552 (8th Cir. 1982). What is required for a Rule 23(b)(2) class is that common questions of law or fact predominate over individual questions, not that every claim be identical. These principles are the starting point for determining the geographic scope of the class.

Even some decentralization of actual decision-making does not preclude class treatment because an overall policy may be implemented through local decisions. *See, Soffard v. Safeway Stores, Inc.,* 78 F.R.D. 460 (N.D.Cal. 1978). In *Karan v. Nabisco,* 78 F.R.D. 388 (W.D.Penn. 1978), the court stated that a statewide class may be appropriate even where the terms, conditions and practices of employment vary between facilities if the discrimination is system wide and if central administration knew of the discriminatory policies and permitted them to continue.

In this case, plaintiffs submitted an offer of proof in the form of statistical evidence showing that discrimination in the Highway Department was systemized rather than limited to a particular area or facility. A statewide class is appropriate when plaintiffs' statistics, broken down by facility, indicate that the discriminatory effect on women is not isolated or unique to one facility. *Stastny v. Southern Bell,* 628 F.2d. 267 (4th Cir. 1980)

It is clear that a statewide class in this case would have been more appropriate than merely one district of the Missouri Highway and Transportation Department. The trial court here denied certification of a statewide class merely on the basis of convenience. Because the purpose of Rule 23 is to avoid multiplicity of suits when the alleged wrong is suffered by all potential members across the state, the trial court and the appeals court have undermined Rule 23. The proper standard for determining manageability is "to compare the fairness and/or efficiency of maintaining a suit as a class action to alternate methods." *Herbst v. International Telephone and Telegraph Co.*, 65 F.R.D. 13 (D.Conn. 1973), *affirmed* 495 F.2d. 1308 (2nd Cir. 1974).

Consequently, if left to stand, the Court of Appeals ruling regarding the scope of the class will seriously undermine the efficacy of Rule 23 in employment litigation. The trial court's decision requires review by this Court in order to preserve the class action device in employment discrimination cases.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

SCHUCHAT, COOK & WERNER
Attorneys for Petitioners

Lisa S. Van Amburg
1221 Locust Street, Suite 250
St. Louis, Missouri 63101
314-621-2626

February 22, 1988